

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **IN AND FOR THE DISTRICT OF DELAWARE**

3                   - - -  
4   **INTEGRATED HEALTH SERVICES**       :      **Civil Action**  
5   **OF CLIFF MANOR, INC.,**           :      :  
6   **et al.,**                          :      :  
7                   **Plaintiffs,**           :      :  
8                   **v.**                    :      :  
9                   **THCI COMPANY LLC,**       :      :  
10                   **Defendant.**           :      **No. 04-910 (GMS)**  
11                   - - -  
12                   **Wilmington, Delaware**  
13                   **Friday, January 13, 2006**  
14                   **11:00 a.m.**  
15                   **Telephone Conference**  
16                   - - -  
17                   **BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.**  
18                   **APPEARANCES:**  
19                   **MICHAEL LASTOWSKI, ESQ.**  
20                   **Duane Morris LLP**  
21                   **-and-**  
22                   **MICHAEL CRYAN, ESQ., and**  
23                   **IGOT CSIDELMAN, ESQ.**  
24                   **Arent Fox LP**  
25                   **(New York, New York)**  
26                   **Counsel for Plaintiffs**  
27                   **VICTORIA COUNIHAN, ESQ.**  
28                   **Greenberg Traurig LLP**  
29                   **-and-**  
30                   **AMOS ALTER, ESQ.**  
31                   **Troutman Sanders LLP**  
32                   **(New York, New York)**  
33                   **Counsel for Defendant**

1 THE COURT: Good morning.

2 (Counsel respond "Good morning.")

3 THE COURT: Counsel, who is on for Integrated  
4 Health?

5 MR. ALTER: Amos Alter.

6 MR. LASTOWSKI: Your Honor, this is Michael  
7 Lastowski. I am local counsel with Duane Morris here in  
8 Wilmington.

9 THE COURT: Good morning.

10 MR. CRYAN: Your Honor, for THCI, this is  
11 Michael Cryan of Arent Fox, with my colleague Igor  
12 Csidielman.

13 MS. COUNIHAN: Your Honor, for THCI is Victoria  
14 Counihan from Greenberg Traurig, and I am local counsel here  
15 in Delaware.

16 MR. SHERMAN: Michael Sherman, in-house counsel  
17 for THCI.

18 THE COURT: Thanks again. Anyone who wants to  
19 jump in and correct the Court's, this summary I am going to  
20 attempt to give on where I think we are, please feel free to  
21 do so, because I, quite frankly, am a little uncertain and  
22 perhaps am in need of having my recollection refreshed a  
23 little bit. But we have a bankruptcy appeal currently on my  
24 docket at 03-610. Is that correct?

25 UNIDENTIFIED SPEAKER: Yes, Your Honor.

1                   THE COURT: As I understand, the essential  
2 question before the Court in that case is the existence of a  
3 master lease. Is that correct?

4                   UNIDENTIFIED SPEAKER: That's correct.

5                   THE COURT: Then this case that we are -- then  
6 this next action that we are talking about at the moment,  
7 04-910, seeks to have claims or disputes among the parties  
8 resolved pursuant to that master lease. But the Court first  
9 needs to determine whether the lease exists. Right?

10                  UNIDENTIFIED SPEAKER: Correct.

11                  MR. CRYAN: For THCI.

12                  It is not necessary that the appeal is  
13 completely determined before the claims that are at issue in  
14 the 910 action are adjudicated in the sense that there is no  
15 dispute that LTC and the nine subsidiaries are occupying the  
16 properties of THCI. And we are seeking -- they have not  
17 been paying rent since last June. And we have asserted  
18 claims, for example, for fraudulent conveyance against LTC  
19 and the nine subsidiaries as well as for money damages.  
20 Those claims have been in this lawsuit from the beginning.

21                  MR. ALTER: This is Mr. Alter.

22                  I would not agree with that characterization,  
23 that these claims would be viable if the appeal were decided  
24 adversely to the landlord.

25                  THE COURT: Okay. Why not?

1                   MR. ALTER: Because most of them, the obligation  
2 to pay rent as opposed to say use and occupancy is based  
3 solely on the existence of the lease. And fraudulent  
4 conveyance would not be relevant unless he got a money  
5 judgment, again which is dependent upon the existence of a  
6 lease.

7                   THE COURT: So at least in your view, Mr. Alter,  
8 it would be prudent for the Court to resolve the bankruptcy  
9 appeal before permitting the 04-910 matter to proceed  
10 forward.

11                  MR. ALTER: Absolutely.

12                  THE COURT: Mr. Cryan, you take a different  
13 view.

14                  MR. CRYAN: Yes. Really, there is no dispute  
15 that they are occupying the premises. And they will not  
16 leave the premises.

17                  So either they are under a lease or they are  
18 holdover tenants. Under the law of any jurisdiction, you  
19 can't simply occupy property and not pay any rent. In fact,  
20 they recognized this principle, because last year, they  
21 filed a motion in the 910 action that is before Your Honor  
22 to pay rent into court. So they recognized that there is an  
23 ongoing obligation to pay rent into court, regardless of  
24 whether the appeal is decided.

25                  THE COURT: Let me ask you, just to interrupt

1 for a second, I will let you continue, was that motion  
2 withdrawn or is it still outstanding?

3 UNIDENTIFIED SPEAKER: That was withdrawn.

4 THE COURT: Go ahead.

5 UNIDENTIFIED SPEAKER: Your Honor, what happened  
6 was, in June of last year, they exercised self-help and just  
7 simply stopped paying all rent. So there has been no rent  
8 paid since June of 2005. The amount due is approaching 7  
9 million dollars. So that's why we filed the eviction motion  
10 seeking immediate possession of the properties. And there  
11 is no reason to put a delay or a stay on discovery in the  
12 910 action because every day that passes we are losing the  
13 trail of the money that we contend is being fraudulently  
14 transferred and conveyed out of these nine subsidiaries to  
15 other persons and entities.

16 So there is no pending motion, even, that  
17 impacts those claims. Those claims are viable and relevant  
18 and they are existing in the 910 action. So there is no  
19 good cause for or any other reason to enter a stay of  
20 discovery right now, given that we are speaking about  
21 discovery of claims that are pending in this case.

22 MR. ALTER: Whether the claims are pending is  
23 dependent on something I will get into in a second. But  
24 even assuming they are, how one determines them is dependent  
25 upon whether or not a lease exists.

1                   THE COURT: Let me interrupt for a second.  
2 Essentially, what Mr. Cryan says is that you can't -- not  
3 you, but your client can't continue to, as it were, squat on  
4 this property without -- I think squatting implies that  
5 there is no rent being paid or no compensation forthcoming  
6 to the owners, the rightful owners of the property.

7                   UNIDENTIFIED SPEAKER: Your Honor, the basic  
8 reason is the following. We believe, based on a fair use  
9 and occupancy test, we have been overpaying for some 20  
10 months. We have paid like 12 million dollars, 15 million  
11 dollars rent already. We believe we have been overpaying.  
12 He says we have resorted to self-help. That is correct in  
13 that we believe we have recovered maybe 50 percent of that  
14 which we have overpaid so far.

15                  Now, we don't believe that the long run will  
16 prove that we owe them money. We think the long run will  
17 prove precisely the opposite.

18                  THE COURT: That matter is clearly in dispute.  
19 Right?

20                  UNIDENTIFIED SPEAKER: Yes, agreed.

21                  THE COURT: So what can be done in the view of  
22 all parties to at least not lose, as has been characterized,  
23 lose the trail, Mr. Cryan, are you also saying the ability  
24 of the plaintiff to pay rent?

25                  MR. CRYAN: Yes, Your Honor, precisely.

1                   MR. ALTER: I think we have that problem right  
2 now. These properties are losers. And unless the tenants  
3 are willing to kick in money from other sources, the  
4 properties are not paying rent -- are not generating enough  
5 money to pay the rent. That is correct.

6                   But we have the same problem that they claim to  
7 have, which is, we believe that if we are entitled to money  
8 back from them, as I indicated earlier, we don't trust their  
9 creditworthiness, either. And we have got a serious problem  
10 and we think at this point we are throwing good money after  
11 bad.

12                  THE COURT: Was that the reason that you filed  
13 the motion to pay rent into court?

14                  UNIDENTIFIED SPEAKER: That was the initial  
15 reason that we did file a motion to pay rent into court,  
16 yes.

17                  THE COURT: Was there an effort prior to the  
18 filing of that motion to negotiate some compromise that  
19 would somehow preserve both parties' abilities to pay in?

20                  UNIDENTIFIED SPEAKER: I am not fully cognizant  
21 of the negotiations. I think in general terms, the answer  
22 to your question would be in the affirmative. But I really  
23 can't give details. I will add that the parties have been  
24 trying to resolve this. We had a full-day mediation before  
25 Judge Poppiti just last week. That unfortunately --

1 obviously, I am not going to go into details, but that did  
2 not reach a satisfactory conclusion.

3 THE COURT: That was on the 03-610 action.

4 UNIDENTIFIED SPEAKER: Yes, it was on the  
5 appeal. As all parties recognized, to resolve the appeal we  
6 have to resolve all questions which are open between the  
7 parties. There was an attempt, I think in good faith by  
8 both sides at that mediation, to resolve it. But, you know,  
9 it takes more than good faith. Sometimes you have to  
10 actually reach an agreement, which we were unable to do.

11 Judge Poppiti has I believe reported to you that  
12 the mediation is concluded. The parties have had some talks  
13 since then, which I cannot say -- certainly have not reached  
14 agreement yet and I cannot promise will, but we are  
15 absolutely willing and we hope to continue negotiations with  
16 them. And we would not be adverse, frankly, to continuation  
17 of the mediation or a new mediation.

18 But that is where we are today.

19 MR. CRYAN: Your Honor, they will do anything  
20 and everything to delay this matter and remain in the  
21 property. We are aware of that.

22 But your order of September 25th, 2005 granted  
23 THCI the ability to reinstate claims against an entity named  
24 Briarwood as part of this action, the 910 action, which is  
25 also called the Missouri action, because it originated in

1 Missouri. And we reinstated those claims against Briarwood  
2 in the second amended counterclaim. And there has been a  
3 motion to dismiss filed that simply ignores the direction in  
4 your order.

5 So beyond the motion to dismiss, the discovery  
6 that we are seeking concerns claims that are absolutely at  
7 issue in the lawsuit regardless of the outcome of that  
8 motion. And there is no reason to stay discovery preventing  
9 us from finding out what's going on with the fraudulent  
10 transfers.

11 The leases require them to provide us with  
12 financial information every month, and for more than a year  
13 they have also failed and refused to provide any financial  
14 information as required.

15 So we are simply left with absolutely no  
16 information that we are entitled to. I don't think there is  
17 any basis here -- if Your Honor would like some case law  
18 cited --

19 THE COURT: Not at this point. Let me find out  
20 from the other side, is the basis for the alleged refusal to  
21 respond to discovery requests in the 910 action, is that  
22 based upon your view that the Court has first to resolve the  
23 03-610 action?

24 UNIDENTIFIED SPEAKER: Only in part. I would  
25 say the primary reason is the following. The claims, Your

1 Honor, dismissed in that other action, there were two  
2 counterclaims -- pardon me, two claims. There were four  
3 counterclaims proposed in the first amended counterclaims in  
4 this action. Four months -- a number of months after Your  
5 Honor's order, they simply served without asking us for  
6 leave of Court with what they labeled second amended  
7 counterclaims, which goes on for some hundreds of pages,  
8 literally hundreds of pages, and contains 13 counterclaims.  
9 So the claim that they have simply added the two claims to  
10 the four claims rings a little false, considering there are  
11 13 counterclaims interposed.

12 THE COURT: Are you saying that new claims  
13 beyond the period that one might file them as a matter of  
14 right were added in this case?

15 UNIDENTIFIED SPEAKER: Absolutely. Absolutely.  
16 I just received their answering papers on my motion to  
17 dismiss. They concede that. They say that they are new  
18 claims.

19 We have made a motion against that. That motion  
20 is not fully briefed yet. It is probably a little premature  
21 to argue the merits of that before Your Honor. In one  
22 sentence, let me just say we have serious 12(b)(6) problems  
23 with a lot of their proposed claims. To say that these  
24 claims are in the action is a little --

25 THE COURT: Premature in your view.

1                   UNIDENTIFIED SPEAKER: A little premature  
2 considering new parties added, new additional counterclaim  
3 defendants added who haven't even answered. It is  
4 definitely premature. The subpoenas that we are talking  
5 about, if Your Honor doesn't feel that it should be rejected  
6 out of hand at least as premature, the subpoena I would like  
7 to move against contains a schedule containing 67 items, 67,  
8 is it, categories of items that they want produced. It is  
9 also exceedingly burdensome and basically irrelevant. They  
10 are not only assuming that the motion to amend their  
11 pleading has been granted, a motion, by the way, they never  
12 made, they are not only assuming that it has been granted,  
13 but they are going even further, where some of their claims  
14 sought to pierce the corporate veil.

15                   This discovery device seems to be looking to  
16 pierce the corporate veil of the entities to whom they are  
17 seeking to pierce the corporate veil, if I am making myself  
18 clear.

19                   It is just beyond all reason.

20                   THE COURT: Okay.

21                   UNIDENTIFIED SPEAKER: Your Honor, the  
22 discovery --

23                   THE COURT: Mr. Cryan?

24                   UNIDENTIFIED SPEAKER: -- that have been in this  
25 case since the beginning of the case (inaudible) before. It

1       is not solely pertaining to claims that are in the second  
2       amended counterclaim.

3                     THE COURT: Let's see if we could parse that.

4       Mr. Alter, you have just heard what Mr. Cryan said. To the  
5       extent that the discovery requests we are talking about,  
6       let's try to focus on them, if we can, those that have been  
7       extant in the case apart from these counterclaims that you  
8       have just talked about, are we able to agree that -- or  
9       identify them and agree on what they are, the discovery  
10      requests?

11                  MR. ALTER: I think I could identify them. I  
12       think my adversary could identify them as well. I am sure  
13       our lists will not be the same.

14                  THE COURT: Why don't you try in a further  
15       meet-and-confer post this conference to agree upon what they  
16       are. I am going to order that you respond to those. I am  
17       not going to order at this juncture that you respond to  
18       discovery requests, at least at this point, I haven't heard  
19       any statement in opposition to your observations that are  
20       not yet, quite frankly, in the case.

21                  UNIDENTIFIED SPEAKER: By the way, these  
22       subpoenas are addressed to third parties. They are not  
23       addressed to the plaintiff.

24                  UNIDENTIFIED SPEAKER: That's right.

25                  Your Honor, that is fine. We will take

1 discovery. As I say, the existing claims for fraudulent  
2 transfers and in the alternative for money damages against  
3 the nine subsidiaries focused precisely on transfers out of  
4 these existing parties to other persons. And we will  
5 proceed to take discovery on that issue. And those claims  
6 are already in the case. We certainly will agree with that.

7 THE COURT: All right. It should be easy enough  
8 for counsel to identify the claims that are already in the  
9 case and therefore identify the related discovery.

10 UNIDENTIFIED SPEAKER: I would add, by the way,  
11 that of these three subpoenas anyway, at least two seem not  
12 to have been properly served, and the third we know that  
13 they claim to have served it because they served a notice of  
14 deposition upon us, the party himself has no knowledge of  
15 the subpoena at all.

16 THE COURT: I am not going to practice law for  
17 anyone here. So that's another matter, and certainly one  
18 for which there is a remedy.

19 So as far as the discovery dispute is concerned,  
20 does that assist the parties in the resolution of it at  
21 least to this point?

22 UNIDENTIFIED SPEAKER: Yes, Your Honor.

23 MR. CRYAN: I think what makes most sense is for  
24 us to go ahead and serve discovery on the plaintiffs that is  
25 focused on the claims that are in the case, so that we can

1 obtain the information that we need for the existing claims.

2 THE COURT: That's fine. Now, if there are  
3 deficiencies -- this is addressed to the defendants --  
4 insofar as these counterclaims are concerned, what I am  
5 speaking about is Mr. Alter's contention that these were  
6 improvidently filed, and you recognize that, you agree  
7 and/or recognize that he is correct, then you should make  
8 efforts to correct whatever deficiencies exist.

9 MR. CRYAN: Your Honor's September 25th, 2005  
10 order was in another case. It was a case against Briarwood  
11 specifically. And in that order dismissing that case -- we  
12 had sought to join the cases, and Your Honor said, instead  
13 of joining the cases, you are dismissing that case but  
14 granting us the, quote, ability to reinstate those claims in  
15 this present 910 action.

16 So we have joined Briarwood in the 910 action.  
17 And we have asserted those claims.

18 Now, we did add additional detail -- we have  
19 learned pertinent facts during the intervening months while  
20 the motion was initially pending that we just sought to  
21 clarify the nature of the claims.

22 THE COURT: Hold on.

23 UNIDENTIFIED SPEAKER: But there is no prejudice  
24 to LTC or Briarwood. They have known that we are seeking to  
25 make sure that our rent is paid and the taxes are paid and

1 all of the other items. There are remedies under the law  
2 for either breach of a lease or for a holdover tenant.

3 THE COURT: Mr. Cryan and Mr. Alter, hold on a  
4 second. It would appear from what has just been said that  
5 the Court may, correctly or incorrectly, have placed its  
6 imprimatur on the filing of these counterclaims. Hold on  
7 just a second.

8 MR. CRYAN: Yes. In fact, that is how we  
9 interpreted Your Honor's order. I have just filed a  
10 counterclaim. To the extent that a motion for leave to  
11 amend was required, we also requested that by way of our  
12 papers, Your Honor.

13 THE COURT: All right. Mr. Alter --

14 MR. CRYAN: All these cases are before Your  
15 Honor.

16 UNIDENTIFIED SPEAKER: Your Honor, on the  
17 so-called motion to amend in opposition to my motion to  
18 dismiss, they say, by the way, please treat this as a motion  
19 to amend. As I said in my papers, if all they had done was  
20 take the two claims from the other action and added it to  
21 the four counterclaims in this action, I wouldn't have stood  
22 on formality.

23 The point is they have 13 claims. A lot of them  
24 are no good. They have sought to add additional  
25 counterclaim defendants, John Does 1 through X, Joan Does,

1 John Roes one through Y. They have attempted to convert all  
2 the counterclaim defendants into plaintiffs, which I don't  
3 think they have the authority to do. A lot of their  
4 counterclaims have serious 12(b) (6) problems. And to claim  
5 I am not prejudiced by this is nonsense.

6 THE COURT: Hold on a second. I am going to put  
7 you on hold for a moment. I am going to hit a mute button  
8 here. I can still hear your conversation. You won't be  
9 able to hear mine.

10 (Pause.)

11 THE COURT: Counsel, in trying to reconstruct  
12 the history of what happened here in chambers, I am reminded  
13 that it was the Court's intention to permit the two, what  
14 would have been compulsory counterclaims -- I think they are  
15 two in number.

16 UNIDENTIFIED SPEAKER: I have no problems with  
17 that.

18 THE COURT: That's you, Mr. Alter?

19 MR. ALTER: That's Mr. Alter. I have no  
20 problems with that.

21 THE COURT: As I was about to continue, that was  
22 the Court's intent, Mr. Cryan. It was not to grant leave to  
23 go beyond that, not without a motion, not without a proper  
24 motion, giving the other side the opportunity to respond.

25 UNIDENTIFIED SPEAKER: That is fine, Your Honor.

1       What happened here is that in the intervening months, they  
2       simply stopped paying rent. They completely altered the  
3       status quo.

4                   THE COURT: I understand that. I understand  
5       that that is your position and those may be the facts. In  
6       terms of process here, that was the Court's intention as to  
7       process.

8                   So I am not prepared today to go beyond that.

9                   So you will need, I don't know what -- we may do  
10      something administratively here with regard to those  
11      additional claims or you may need to file a motion to amend.

12                  UNIDENTIFIED SPEAKER: Yes, Your Honor.

13                  THE COURT: But the other side needs to be given  
14      an opportunity to respond to that motion. Okay?

15                  UNIDENTIFIED SPEAKER: So, Your Honor, the  
16      claims against Briarwood itself are deemed to be added.

17                  THE COURT: Yes. Whatever those are, what we  
18      viewed as compulsory counterclaims, yes.

19                  UNIDENTIFIED SPEAKER: That were in the original  
20      pleadings.

21                  THE COURT: Right. They are deemed to be added.

22                  UNIDENTIFIED SPEAKER: Thank you, Your Honor.  
23      And we can proceed on discovery forthwith.

24                  THE COURT: Yes.

25                  UNIDENTIFIED SPEAKER: Thank you, Your Honor.

1 UNIDENTIFIED SPEAKER: Even against third  
2 parties?

3 UNIDENTIFIED SPEAKER: There is no reason not to  
4 include third parties.

5 THE COURT: Why would you -- who was that? Mr.  
6 Alter?

7 MR. ALTER: Yes.

8 THE COURT: Why not?

9 MR. ALTER: Well, for one thing it is customary  
10 to have discovery of the parties first. Number two, this is  
11 to a great degree very burdensome.

12 THE COURT: The third parties can make that  
13 assertion.

14 MR. ALTER: I recognize it is for them to make  
15 that assertion.

16 THE COURT: I am not in the habit, nor am I  
17 going to get in the habit, of micromanaging counsel's  
18 independent discovery efforts. Okay?

19 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

20 THE COURT: Anything else, counsel?

21 UNIDENTIFIED SPEAKER: No, Your Honor.

22 THE COURT: Take care.

23 (Teleconference concluded at 11:25 a.m.)

24 - - -

25 Reporter: Kevin Maurer